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No. 90-1168

In the Supreme Court of the United States

OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS AND
TOWN OF WELLESLEY, MASSACHUSETTS,
PETITIONERS,

v.

BOSTON EDISON COMPANY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals followed established principles in holding on the factual record before it that the plaintiffs failed to offer substantial evidence that Boston Edison possessed monopoly power in the relevant market.

2. Whether the Court of Appeals followed established principles in holding on the factual record before it that the plaintiffs failed to prove conduct that was exclusionary within the meaning of Sherman Act § 2.

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RESPONDENT'S BRIEF IN OPPOSITION

Statement

1. *Background.* Boston Edison Company ("Boston Edison")[1] sells electricity to, among others, municipally-owned electric systems in Concord and Wellesley, Massachusetts (the "Towns"). The municipally-owned systems have lawful retail monopolies in their respective towns. The Towns resell to their retail customers (*i.e.*, homes and businesses) the electricity that the Towns buy from Boston Edison. The retail electric rates charged by the Towns to their customers are not regulated and the Towns have enjoyed great success with these systems.

By contrast, Boston Edison's rates are fully regulated. A state agency regulates its retail rates.[2] Boston Edison's whole-

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[1] Pursuant to Sup. Ct. R. 29.1, Boston Edison states that it has no parent or subsidiary companies (other than wholly-owned subsidiaries).

[2] Boston Edison has a lawful retail monopoly in other communities in the Boston, Massachusetts area.

sale rates — including those it charges for selling electricity to the Towns — are regulated by the Federal Energy Regulatory Commission ("FERC").

This action reflects the Towns' dissatisfaction with FERC's rate decisions. As summarized by the Court of Appeals:

> Between 1984 and 1987, Edison filed a series of wholesale rate increases with FERC. Wellesley and Concord vigorously opposed those rate increases before the Commission. In each case, after briefly suspending the rates, the Commission allowed them to take effect subject to refund. The towns sought judicial review of FERC's decisions. Eventually, with one exception not relevant here, this court upheld as lawful the relevant FERC determinations,
>
> Concord and Wellesley then attacked the same wholesale rate increases on another legal front. They brought this antitrust action in federal district court.

Appendix to Petition for a Writ of Certiorari ("Pet. App.") 7a (citations omitted).[3] The Towns claimed that the increases in the prices they pay for wholesale power subjected them to a "price squeeze" constituting monopolization under Sherman Act § 2.

While the Towns continued to buy electricity at wholesale from Boston Edison notwithstanding these price increases, the

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[3] The Towns purport to summarize those proceedings. Petition for a Writ of Certiorari ("Pet.") 4-7. The Towns' summary is materially inaccurate. Details concerning the myriad issues in the regulatory proceedings are available in reported regulatory and court decisions as follows:

S-8 Filing: 29 FERC 61,460; 30 FERC 61,029, *Town of Wellesley* v. *FERC*, 786 F.2d 463 (1st Cir. 1986); 40 FERC 61,301, *reh. denied*, 43 FERC 61,193; 41 FERC 61,506; *Town of Concord* v. *FERC*, 860 F.2d 1072 (1st Cir. 1988); 42 FERC 61,374, *reh. denied*, 43 FERC 61,309; *Boston Edison Co.* v. *FERC*, 885 F.2d 962 (1st Cir. 1989).

S-8/PR Filing: 36 FERC 61,233, *reh. denied;* 38 FERC 61,112; *Town of Concord* v. *FERC*, 844 F.2d 891 (1st Cir. 1988); 40 FERC 63,048.

S-9 Filing: 41 FERC 71,004, *reh. denied;* 41 FERC 61,161.

Subtransmission Facilities Filing: 38 FERC 61,035; 43 FERC 63,008.

Towns also began making wholesale purchases from another electricity generator, which transmitted this power from the Canadian border to the Towns over Boston Edison's transmission lines. For this service, the Towns paid Boston Edison a nominal transmission charge. Pet. App. 26a. The Towns' counterparts in nearby communities took even greater advantage of the market options open to them: as the Court of Appeals found, those "municipalities to the north, south, east and west of Concord and Wellesley, bought their electricity from production companies other than Boston Edison." Pet. App. 26a. The Towns knew of this flourishing wholesale market. They declined to shop around to a greater degree because, in the words of the Towns' witnesses, they "just didn't want to" unless they were assured in advance of "huge savings." Joint Appendix ("J.A.") 876, J.A. 1040-1041.

During the same period, the municipal electric systems of these two suburban towns earned substantial returns and increased their sales. Pet. App. 24a. The Towns did not lose customers to Boston Edison, and did not give any serious thought to leaving the electricity distribution business. J.A. 757, J.A. 759, J.A. 760, J.A. 876-878, J.A. 1009, J.A. 1013-1014, J.A. 1101-1102, J.A. 1296, J.A. 1325, J.A. 1693.[4]

2. *The Court of Appeals' Opinion*. The Court of Appeals identified two "fatal" problems with the Towns' case.

The Court found that the Towns had "failed to show that Boston Edison possessed monopoly power in the relevant market" — *i.e.*, "the *generation* level, the industry level at which plaintiffs claim Edison charged too high a rate." Pet. App. 25a, 26a (emphasis in original).

The Court of Appeals observed that Boston Edison's 12% share of the New England electricity generating market was "far" less than the 70%-90% of sales thought indicative of monopoly power. Pet. App. 26a.

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[4] The petition's statement closes at p. 11 with a puzzling reference to events "after the court of appeals issued its decision," and perforce outside of the record. Boston Edison offers no comment on the accuracy of matters outside the record below.

The Court of Appeals then analyzed the three pieces of evidence offered by the Towns to support their monopoly power allegation. The first was a study suggesting that Concord would be better off buying from Boston Edison, which over the long run could offer cheaper rates because its rates are based on the historic cost of old, inexpensive units. The study proved (if anything) only that Boston Edison might be able to underprice other sellers, a fact that is "consistent with a perfectly competitive marketplace" and "does not show that Edison has monopoly power." Pet. App. 27a-28a. The second item was a provision in Boston Edison's wholesale tariff on file with FERC.[5] That provision did not give Boston Edison monopoly power because, among other reasons, "the record does not show that the tariff either unreasonably, or significantly, limits a customer's ability to buy from others. To the contrary, the [Towns] have bought power from non-Edison sources . . . despite the provision." Pet. App. 28a. The third set of facts bore on the Towns' allegation that Boston Edison had a monopoly over what "the [Towns] argue [is] the kind of electricity supply service they need — a firm commitment by a generating source to supply their full requirements. . . ." This con-tention failed on the evidentiary record because the only witness with personal knowledge testified that at least one other company would supply wholesale service in this fashion. Pet. App. 28a-30a.[6] The Court of Appeals concluded

[5] This feature of the tariff provides for the Towns to compensate Boston Edison for actual losses it suffers that are caused by the Towns' switch to different wholesale suppliers on short notice. In this case, the dispute relating to this provision arose when the Towns gave Boston Edison less than a week's notice of their decision to buy power from another supplier. *See, e.g.*, J.A. 1284, J.A. 1289-1290, J.A. 1316-1317, J.A. 1394, J.A. 4112.

[6] Boston Edison also argued that so-called firm requirements power, which simply refers to one contractual arrangement among many for buying electricity for resale, failed as a matter of law to describe a distinct market or sub-market. *Compare* J.A. 567, J.A. 673, J.A. 821, J.A. 963, J.A. 1446-1447, J.A. 1448-1450, J.A. 1454, J.A. 1469-1470, J.A. 3879-3881 (describing different ways in which wholesale electricity is bought and sold) *with, e.g., Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962); *Home Placement Service, Inc.* v. *Providence Journal Co.*, 682 F.2d 274, 280 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983). In light of the failure of proof, the Court of Appeals had no need to reach this legal question.

that the record evidence was "simply too skimpy to support a 'monopoly power' conclusion." Pet. App. 30a.

The Court of Appeals also found that on the factual record before it, the "price squeeze" did not constitute exclusionary conduct — acquisition or maintenance of monopoly power by improper means — within the meaning of Sherman Act § 2. The Court of Appeals reached this conclusion by comparing "the challenged practice's likely anticompetitive effects with its potentially legitimate business justifications." Pet. App. 9a. The Court of Appeals left open the possibility that on different facts a wholesale electricity customer could prove that a price squeeze is exclusionary conduct. Pet. App. 25a.

Having identified two fatal flaws in the Towns' case, the Court of Appeals did not expressly rule on numerous other points raised by Boston Edison, including the complete absence of any evidence of competitive injury. However, the Court of Appeals indicated that it would have ruled for Boston Edison on this ground, if reached, observing: "we cannot find significant evidence that Edison's price squeeze deprived plaintiffs of a 'living profit'," as must be established under *United States* v. *Aluminum Co. of Amer.*, 148 F.2d 416, 437 (2d Cir. 1945) *("Alcoa")*. Pet. App. 24a. *See also, e.g., Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S.Ct. 1884 (1990); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 562-63 (1981).[7]

Reasons For Denying The Petition

The opinion below decides complex factual issues according to well-settled legal principles. It presents no conflict with the

[7] For the same reason, the Court of Appeals had no need to decide the other grounds upon which Boston Edison sought reversal. Those included the Towns' failure to prove that they actually were competitors with Boston Edison, the conflict between the admission of the Towns' expert evidence and the filed rate doctrine articulated by this Court, the improper recovery of "overcharge" damages that completely duplicated remedies available at FERC, and several erroneous jury instructions.

decisions of other circuits or of this Court, and does not warrant further review. Indeed, neither question posed by the petition is in fact presented in this case.

The Court of Appeals correctly found that there was no evidence of monopoly power in the relevant market. This ruling is compelled by the evidence, is consistent with the decisions of every other court to have considered the issue, and is dispositive of petitioners' claims. There is, therefore, no need to consider petitioners' immunity contentions. In any event, the immunity argument misses the mark because the opinion below did not create an immunity but, instead, found that the Towns had not proven conduct that was exclusionary under Section 2.

1. The Court of Appeals ruled that the Towns failed to prove that Boston Edison had monopoly power in the wholesale market, which is the relevant market for analysis of the price squeeze claim. This holding is dispositive.

The Towns cannot and do not challenge the Court of Appeals' analysis of the evidence. Instead, they unsuccessfully attempt to create an issue with respect to the definition of the relevant market. There is no conflict in the circuits on this point. Every appellate court that has considered the issue of relevant market in a price squeeze context has, with the Court of Appeals below, held that the wholesale market is the relevant market — since without a wholesale monopoly any seller attempting to impose a price squeeze would simply lose customers if it set wholesale prices too high. *Compare* Pet. App. 25a *with Alcoa*, 148 F.2d at 422-425, 436-439; *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 808-809 (3d Cir. 1984), *cert. denied*, 477 U.S. 908 (1986). Each of the two circuits which have expressly addressed the issue in an electric utility context have agreed with the opinion below. *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173, 1176 n.4 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 312 (3d Cir. 1982).

Contrary to the Towns' claim (Pet. 17-18), *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) (*"Mishawaka II"*), is wholly consistent with the opinion below. *Mishawaka II* did not expressly rule on the market definition question. To the extent the opinion discussed the issue, however, the Seventh Circuit plainly indicated its agreement with the approach expressly adopted by the Third, Eighth and now First Circuits. The Seventh Circuit noted that the district court had found the defendant utility to have a monopoly of retail electric sales "as well as a monopoly of the supply of *wholesale* electric power upon which the municipalities depend." The Court expressly disapproved the utility's threats to the municipalities' "*sources* of power," and commented that "[t]here was no realistic substitute source of *wholesale* power for the cities to turn to." *Mishawaka II*, 616 F.2d at 980, 983, 985 (emphasis added). *Mishawaka II* does not suggest, much less hold, that a showing of monopoly over retail sales would sustain a finding of market power.[8]

The Towns' citation to *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) also is entirely misplaced. In *Otter Tail*, the Section 2 offense stemmed from the utility's refusal to "wheel" or transmit *wholesale* electric power. Its monopoly power lay in control of (and refusal to share) transmission facilities that were essential for the local distribution companies to get a supply of *wholesale* power. In contrast, the record below "clearly demonstrate[d] that Boston Edison will 'wheel' (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high." Pet. App. 25a-26a. As a

[8] The petition's suggestion that there is a conflict with *City of Groton* v. *Connecticut Power & Light Co.*, 662 F.2d 921 (2d Cir. 1981) (*"Groton"*) is equally unfounded. Relevant market was not an issue in *Groton*. The parties and the Court of Appeals adopted the district court's willingness to "assume arguendo that [the defendant utilities] had monopoly power." *City of Groton* v. *Connecticut Light & Power Co.*, 497 F.Supp. 1040, 1052 n.14 (D. Conn. 1980), *aff'd in part and vacated in part on other grounds*, 662 F.2d 921 (2d Cir. 1981).

result, the Towns (like similarly-situated municipal systems) were free to buy and did buy electric power from suppliers other than Boston Edison.[9]

In the absence of proof of monopoly, there can be no claim under Section 2 of the Sherman Act. There is, therefore, no occasion to consider other arguments raised by the petition, which are, in any event, without merit.

2. The Towns' characterization of the opinion below as creating an immunity disregards both the language and holding of the Court of Appeals. The Court of Appeals explicitly pointed out that "we *are not* saying either that the antitrust laws do not apply in this regulatory context, or that they somehow apply less stringently here than elsewhere." Pet. App. 11a (emphasis in original). Lest there be any doubt, the Court of Appeals also said: "[e]ven though Boston Edison is a regulated firm, it has no blanket immunity from the antitrust laws." (Pet. App. 8a). The petition's discussion of immunity principles is simply beside the point.

3. The Court of Appeals' holding on the substance of the Towns' claim is, by its own description, a limited one. It is that normally a price squeeze is not exclusionary conduct where both wholesale and retail sales are regulated. That conclusion is confirmed by the record in this case, and the Court of Appeals left to another day whether circumstances not present here would dictate a different result.

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[9] There is nothing to the Towns' suggestion that their reliance on Boston Edison for transmission services sufficed to show that Boston Edison had monopoly power, under an "essential facilities" theory. Pet. 20-21. The Towns waived any such argument below. The district court declined to submit the case to the jury on an essential facilities theory, *compare* J.A. 266-68 *with* J.A. 1816. The Towns did not object to this refusal, and the jury's verdict for the Towns plainly cannot be sustained on the basis of a theory which the jury was not asked to consider. *Northeastern Telephone Co.* v. *Amer. Tel. & Tel. Co.*, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

It was, in any event, plainly correct not to submit the case on an essential facilities theory, since the Towns did not submit any evidence of denial of access. *Compare* Pet. App. 25a-26a *with, e.g., MCI Communications Corp.* v. *Amer. Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). *See also* n.13, *infra*.

The Towns' assertion of conflict among the circuits is, again, off the mark. The case law involving price squeeze claims against a regulated utility is small in number and not well developed. Observing that some reported opinions have suggested (or assumed) that a price squeeze may be unlawful in the regulated electricity industry, the Court of Appeals succinctly and correctly explained that these cases had not decided the issue presented in this case:

> In only one of those cases, however, did the court actually enter, or affirm, a judgment against the defendant; thus, there is extremely little case law *holding* that a public utility price squeeze is exclusionary. Moreover, in all of the cases we have cited, the price squeeze allegation was but one of several allegations of several different kinds of exclusionary conduct, and the one court that affirmed a Sherman Act § 2 judgment against a utility stressed that it might well *not* have done so had the price squeeze stood alone (as it does in the case before us). *See Mishawaka II*, 616 F.2d at 986 (suggesting that "no one aspect [of the defendant's conduct] standing alone is illegal").

Pet. App. 24a (emphasis in original).

The Towns' particular assertion that the opinion below conflicts with the *City of Kirkwood* v. *Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (*"Kirkwood"*), *Groton* and *Mishawaka II* decisions is incorrect. *See* Pet. 12-13. The Court of Appeals correctly observed that none of these decisions directly dealt with the issues raised by the opinion below.

Kirkwood reviewed a district court's ruling, on summary judgment, that immunity principles barred it from considering the merits of the municipalities' claim. The Eighth Circuit reversed and remanded the case for proceedings on the merits

— including, presumably, the question whether the conduct alleged was exclusionary.[10]

Groton reviewed a district court's ruling, after trial on the merits, that the plaintiff municipalities had failed to prove an antitrust violation. The Second Circuit found that the lower court had failed to apply the proper legal standard for judging whether the municipalities had established other elements of their claim — competition and competitive injury — and accordingly remanded for further factual development. *Groton*, 662 F.2d at 930, 934-35.[11] The issue of whether a price squeeze itself amounted to exclusionary conduct was not addressed, and apparently was not argued to the Court of Appeals.

Mishawaka II is the only decision to uphold a judgment that was based to any degree upon a finding that an electric utility's rate filings created a price squeeze. But the price squeeze claim was only one of many challenged exclusionary practices in *Mishawaka II*, including a finding that the defendant utilities had threatened to cut off the municipalities' supply of wholesale power. This threatened refusal to wheel is precisely the kind of conduct that this Court has found to violate Section 2. *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).[12] The Seventh Circuit indicated, however, that it might have found no Section 2 violation if, as here, the price squeeze stood alone as the sole conduct alleged to be exclusionary. *Mishawaka II*, 616 F.2d at 986.[13] Thus, to the extent that

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[10] The petition does not seriously dispute this reading of *Kirkwood*. Instead, the petition asserts a conflict based solely on the false premise that the First Circuit decided the case below on *immunity* grounds. *See* Pet. 14 & n.4.

[11] On remand, the district court again found for the defendant utilities on the merits. *City of Groton* v. *Connecticut Light & Power Co.*, Slip Op., C.A. No. 15,609 (D. Conn. Jan. 31, 1986).

[12] *See also Groton*, 662 F.2d at 932.

[13] The petition claims that the Towns, too, proved other conduct that is acknowledged to be exclusionary. Specifically, Towns assert:

> as the court below recognizes elsewhere, the Towns presented evidence that Edison had also used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. App. 25a-26a.

Pet. 13 n.3.

the Seventh Circuit focused on the price squeeze claim alone, the opinion suggests agreement with the Court of Appeals here. Certainly, there cannot be said to be a conflict between them.[14]

On the merits, the opinion below rests on sound principles that were confirmed by the extensive evidentiary record. The Court of Appeals observed that even in the context of unregulated firms, a rule labelling "price squeeze" as unlawful conduct has nearly equal costs and benefits. Pet. App. 12a-17a. The Court of Appeals then found that the presence of dual rate regulation normally will tip the balance against finding "price squeeze" to be a form of exclusionary conduct. Regulation makes it less likely that a price squeeze will raise entry barriers (the primary antitrust problem created by a price squeeze). *See* Pet. App. 13a-14a, 18a. In addition, regulation makes it less likely that a price squeeze in fact would eliminate competitors from the marketplace, an intuition amply borne out by the record evidence showing that the Towns' distribution systems flourished despite the alleged "squeeze." Pet. App. 19a, 24a.

In fact, the Court of Appeals said:

> The plaintiffs, however, *cannot show* (indeed, with one exception, they do not try to show) that Boston Edison used its control of electricity *transmission* to their disadvantage. To the contrary, the record clearly demonstrates that Boston Edison will "wheel" (*i.e.*, transmit) electricity from other producers to any distributor upon request, all for a nominal transmission charge that no one claims is unreasonably high. *See* Record Appendix at 1442, 1451-52, 1704-05. . . . The only arguably contrary evidence in the record consists of Concord's claim that Boston Edison refused to connect it to a 115 kv line; but the record does not (1) suggest that Concord needs that connection to buy electricity elsewhere, (2) indicate that the dispute concerns anything other than the connection price, or (3) show that the demanded connection price was unreasonably high.

Pet. App. 25a-26a (emphasis partly added and partly in original).

[14] As the earlier decisions did not analyze in any detail whether a price squeeze in this context is exclusionary, there also is no conflict merely because the Court of Appeals' "reasoning and analysis" took a different direction than that of earlier opinions. *See* Pet. App. 24a.

On the other side of the equation, the First Circuit found that an antitrust price squeeze action threatens the antitrust goal of lower prices if, for example, a utility seeks to avoid a wholesale price squeeze claim by attempting to raise retail rates. Pet. App. 20a-21a. In addition, the prize squeeze action presents "special administrative difficulties" in this context. Pet. App. 21a. Juries effectively would be asked to second guess the regulator's cost and investment allocation decisions, as appeared to have occurred here, Pet. App. 21a-22a, and utilities potentially would face liability for requesting permission to charge a Constitutionally-guaranteed, non-confiscatory wholesale rate. Pet. App. 21a, *citing to, inter alia, Bluefield Water Works & Improv. Co.* v. *Public Serv. Comm'n*, 262 U.S. 679, 690 (1923).

A further reason for denying review is that this case does not squarely present the issue of whether a price squeeze constitutes exclusionary conduct. The complex factual record below was particularly hostile to a finding that the price saqueeze here was exclusionary, and that record undoubtedly influenced the opinion below.

The Towns could have bought at wholesale from other suppliers, and Boston Edison did not interfere with transmission of power to the Towns or raise any other threat to their power supply — simultaneously demonstrating that Boston Edison did not have monopoly power and belying the Towns' claim that they were, in fact, squeezed by Boston Edison's electricity rates.

The Towns suffered no competitive harm — loss of specific customers or the like — and the Court of Appeals indicated that this failure of proof provided a further reason for rendering judgment for Boston Edison. The Towns' theory of "potential harm" was that customers who have a choice where to locate "*might* decide to forego Concord and Wellesley and settle in a town served by Edison." Pet. App. 8a (emphasis added). However, there was no "significant evidence" that Boston Edison's prices had deprived the Towns of a living profit, "for the plaintiffs earned substantial returns, and even increased

their sales, during the price squeeze period." Pet. App. 24a. As this Court reemphasized last term, proof of competitive harm is essential in any damages action for alleged violation of the antitrust laws. *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 110 S.Ct. 1884 (1990).

4. The issues asserted in the petition are not of widespread importance, even assuming they were raised by this case. This is the first appellate decision in nearly a decade to address the price squeeze issue, and the first ever reviewing a plaintiffs' judgment where the price squeeze was not accompanied by threats to the municipal's wholesale power supply. No case ever has found a price squeeze to cause actual loss of customers or to cause a change in ownership of the retail distribution monopoly. At the same time, FERC has repeatedly reaffirmed its commitment to adjust wholesale electric rates to remove even potential anticompetitive effects of particular wholesale-retail rate relationships. *See, e.g., Southern California Edison Co.*, 50 FERC ¶61,275 (1990).[15] Far from an issue with important practical consequences, the price squeeze cause of action is a legal theory in search of a problem.[16]

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[15] There is no merit to the suggestion that the decision below will undermine the legal basis for consideration of price squeeze claims by the FERC. Pet. 22. The Court of Appeals expressly took note of the protection that is afforded wholesale customers by FERC's ability and duty "to consider the alleged price squeeze harm," in accordance with *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976). Pet. App. 23a.

[16] *See* Joskow, *Mixing Regulatory and Antitrust Policies in the Electric Power Industry: The Price Squeeze and Retail Market Competition*, in *Antitrust and Regulation*, 173, 186 (F. Fisher ed. 1985).

Conclusion

The petition for a writ of certiorari should be denied.

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